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No. 85-229

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, EX REL., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Petitioners,

-vs-

APEX CONSTRUCTION COMPANY, INC., a corporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

Respondents.

OPPOSING BRIEF OF RESPONDENTS, APEX CONSTRUCTION COMPANY, INC. and OKLAHOMA SURETY COMPANY, TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1985

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QUESTIONS PRESENTED FOR REVIEW

Petitioners' presentation of the questions for review are satisfactory to these respondents.

THE PARTIES

Petitioners are the Sac and Fox Tribe of Indians and its attorney, G. William Rice, as an individual. For convenience and brevity, they will be referred to collectively as the 'Tribe". The respondents are Apex Construction Company, Inc. (hereafter Apex), Briesch Engineering Company, Inc. (hereafter Briesch), and Oklahoma Surety Company (Oklahoma Surety).

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STATEMENT OF THE CASE

Although the Tribe's Statement of the Case fairly reflects the proceedings below, for the purpose of continuity and clarification Apex and Oklahoma Surety submit a brief chronological summary.

The Department of Commerce, Economic Development Administration (EDA) granted funds to the Tribe to finance the design and construction of a museum and cultural cen-

ter to be built on the Tribe's land held in trust by the United States. In accordance with EDA guidelines, the Tribe employed Briesch (an engineering firm) to design the building, and awarded the construction contract to Apex, the low bidder. EDA contract and bond forms were utilized. To comply with the contract, Apex, as principal, and Oklahoma Surety, as surety, executed a performance bond in favor of the Tribe, as obligee.

Approximately three and one-half years after the project was complete and the engineer and contractor were fully paid with grant funds, the Tribe and its attorney (as an individual) filed suit in the U. S. District Court for the Western District of Oklahoma seeking to have both contracts declared void, plus a money judgment for all the grant money paid them. As authority for both the court's jurisdiction and the merits of the claims, the Tribe relied upon 25 U.S.C. § 81, which specifies that certain contracts with Indian Tribes be approved by the Secretary of the Interior and the Commissioner of Indian Affairs.

Alternative actions alleging breaches of the engineering and construction contracts, as well as the performance bond, were asserted. The Tribe contended that the trial court had pendent jurisdiction to hear the contract actions, even if § 81 jurisdiction was lacking.

Apex, Briesch, and Oklahoma Surety questioned the trial court's jurisdiction, arguing that the contracts were not of the type which necessitated Interior approval and that, in any event, the funds paid them were granted by the government and were not tribal funds contemplated by § 81. The trial court treated the jurisdictional objections as

motions to dismiss for failure to state a claim, and dismissed the entire complaint via an unpublished order. The trial court opined that § 81 was not applicable (a) because grant funds, not tribal funds, were involved, and (b) because he was not convinced that the contracts fell within the purview of § 81 protection.

The U. S. Court of Appeals, Tenth Circuit, found it unnecessary to decide whether § 81 covered the type contracts involved, and affirmed on the singular basis that § 81 did not apply because grant or gift funds, as opposed to tribal funds, were involved. *The Sac and Fox Tribe of Indians, et al.* v. *Apex Construction Company, Inc.*, 757 F.2d 221 (10th Cir. 1985).

REASONS FOR NOT GRANTING THE WRIT.

Before considering the Tribe's specific arguments a brief review of § 81 and its history is in order. Section 81 provides in pertinent part:

> "No agreement shall be made by any person with any tribe . . . for the payment . . . of any money . . . in consideration of *services* for said Indians relative to their lands, or to any claims . . . [against the United States] . . . unless such contract . . . [is executed and approved in a specific manner]. (emphasis supplied).

Quite obviously the statute encompasses two types of "service" contracts — those "relative to [Indian] lands" and those "relative" to Indian claims against the United States.

The question arises: Does the statute cover all contracts which are even remotely "relative" to Indian lands, even though they don't require the payment of tribal funds,

or does it cover only "service" type contracts which are "relative to [Indian] lands" and call for the payment of tribal funds? The legislative history of § 81 appears to answer the question in favor of the latter interpretation.

The history of § 81 may be gleaned from House Committee on Indian Affairs, Investigation of Indian Frauds, H. R. Rep. No. 98, 42d Cong., 3d Sess. 3 (1873). Section 81 had its genesis in a March 3, 1871 Act of Congress (16 Stat. 544-571) which followed an extensive investigation into frauds in Indian matters — frauds against the government and against the tribes and Indians themselves. Section 3 of the 1871 Act (16 Stat. 570) contains almost identical language to the first paragraph of § 81. The second portion of Section 3 of the Act, like § 81, declares void contracts not properly approved, provides for suits to recover payments, and, in addition, subjects the person contracting with the tribe (as well as aiders and abettors) to a misdemeanor charge carrying a minimum fine of $1,000 and a minimum prison term of not less than six months.

H. R. Rep. No. 98 indicates that the Committee's investigation centered around "representative contracts" (p. 3) under which attorneys, agent, or middle-men undertook to represent the tribes and Indians in their claims against the government. In other words, "service" type contracts. The Committee did not concern itself with "public" contracts — where the government purchases supplies for the Indians under treaty stipulations or acts of Congress, presumably because § 1 of the 1871 Act (16 Stat. 568, an appropriations provision) directed the government to make no payments for goods, supplies, transportation, buildings, or machinery placed on reservations pursuant to contracts

with the Interior Department until the accounts and vouchers had been examined by a board of commissioners appointed by the President.

The concern, therefore, was with agents, attorneys, and middle-men who were obviously taking advantage of the Indians when contracting to secure allotments, collect funds owed by the government, and assert claims of a similar nature.

The Committee did not believe that § 3 of the 1871 Act went far enough because it did not regulate the manner of making private contracts with Indians and tribes, did not require that a copy of the contract be furnished to the government, did not direct the disposition of money collected under the service contracts, and did not regulate payment for partial performance. Thus, the Act of May 21, 1872, was formulated and enacted (17 Stat. 136). The substance of the 1872 Act is essentially the same as the 1871 Act and the present day version of § 81 with certain variations. The 1872 version required that copies of contracts be submitted, that they be executed before a judge of a court of record, and that they be approved in writing by the Secretary of Interior and the Commissioner of Indian Affairs. Also, other details were to be supplied — the type information the government might need to exercise its discretion in approving or disapproving. Section 3 of the 1872 Act specifies that "no money shall be paid to any agent or attorney by the government" under any *such* contract other than "the fee due him for services rendered thereunder." (17 Stat. 137). The contracting party was required to prepare and swear to a detailed claim to be submitted to the government for examination.

The Committee opined that the 1872 statute would serve to prevent the "godless robbery" of the Indians by attorneys and claim agents. The House Report treats in detail contracts between attorneys, claim agents, etc., and the Indians or tribes.

The inescapable conclusion is that § 81 was enacted to regulate attorney or claim agent "service" type contracts, not contracts under which the private sector constructs buildings on tribal property. There obviously existed in 1871 and 1872 a considerable number of Indian claims against the United States arising out of treaties and acts of Congress. The House Report suggests that the Indians really didn't need attorneys or claim agents since the establishment of a claim depended wholly upon the presentation of government records or acts of Congress.

Thereafter the Acts of 1871 and 1872 were revised into R.S. § 2103. Although the language was changed slightly, the substance remained and continues to be the same through the current codification into § 81, but for a 1958 amendment (Public Law 85-770, 72 Stat. 927) which deleted the requirement that such contracts be executed before a judge of a court of record. The revised statutes, as well as the more recent codification, rearranged some of the sections. For example, the requirement to submit a sworn claim to the government for approval is contained in § 82, as is the requirement that any funds collected on behalf of tribes and Indians be paid over to the United States. The criminal penalty for a violation of §§ 81 and 82 is now codified in 18 U.S.C. § 438.

F. Cohen, *Handbook of Federal Indian Law*, p. 281 (1942), states that the legislation was directed against the "godless robbery of those defenseless people" by attorneys and claim-agents. A reading of the House Report leads to that conclusion.

More recently, a Subcommittee of the Senate Committee on Interior and Insular Affairs submitted a partial report dealing with contracts between Indian tribes and attorneys: *Attorney Contracts with Indian Tribes,* S. Rep. No. 8, 83d Cong., 1 Sess., pp. 2-3 (1953). That report indicates that § 81 was intended to apply to contracts between attorneys and agents on the one part and the tribes and individual Indians on the other.

Moreover, Interior's only regulations under § 81 are marshalled under the heading "Attorney Contracts With Indian Tribes." See: 25 C.F.R. § 72 (1982). The Department of Interior's interpretation of an Indian statute is entitled to "great weight" in judicial construction. *United States* v. *Jackson*, 200 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930).

In summary, § 81 most definitely appears to have been directed toward the evils of unconscionable attorney or claim-agent contracts, not toward construction contracts funded with grant money. The vast majority of cases dealing with § 81 have involved agents, attorneys, or others who have contracted to represent tribes or Indians in asserting claims against the government or in managing their tribal property. For example, *United States* v. *Crawford,* 47 Fed. 561 (W.D. Ark. 1891) was concerned with a contract between the Creek Nation and "delegates" employed

to sell "Oklahoma" to the United States. In deciding the jurisdictional issue the court referred to § 81 as a statute controlling the payment of money to agents or attorneys. Similarly, *In re Sanborn*, 148 U.S. 222, 13 S.Ct. 577, 37 L.Ed. 429 (1893), refers to § 81 as governing "contracts between Indians and agents or attorneys for services. . . ." U.S. at p. 227, S.Ct. at p. 579, L.Ed. at p. 431.

With this brief summary of legislative history, the specific contentions of the Tribe may be answered more logically.

A. RESPONSE TO THE TRIBE'S CONTENTIONS THAT DECISIONS OF THE CIRCUIT COURTS ARE IN CONFLICT

Apex and Oklahoma Surety disagree with the Tribe's argument that the decisions of the Circuit Courts are conflicting.

The dismissed complaint of the Tribe alleges that it entered into a construction contract whereby Apex was to construct a building on tribal lands and be paid with funds granted by the EDA. Performance of the construction contract was bonded by Oklahoma Surety. Neither Apex nor Oklahoma Surety had anything to do with securing the EDA grant. Both the contract and the bond were on EDA forms.

The Tribe claims that the engineering and construction contracts are void for lack of § 81 approval, and that it (and its attorney) are entitled to recover all payments made thereunder. The purported liability of Oklahoma Surety is apparently based upon the Tribe's mistaken belief that the contract performance bond (covering an alleged void con-

tract) obligates the surety to refund the construction money (even though the bond was conditioned that Apex would "faithfully perform its duties" under the contract).

The trial judge determined that § 81 was inapplicable because grant funds, not tribal funds, were involved, and stated that he was not convinced that either contract was one to provide services for Indians "relative to their lands."

The Tenth Circuit affirmed for the singular reason that § 81 does not apply where government grant money is being spent. The court agreed with *Brown* v. *United States*, 486 F.2d 658 (8th Cir. 1973), which held that § 81 governs only "the right to be compensated with tribal funds." *Id.* at 661. *Brown* involved a contract with an attorney.

The Tribe argues that both the instant case and *Brown* conflict with *Wisconsin Winnebago Business Committee* v. *Koberstein*, 762 F.2d 613 (7th Cir. 1985) and *United States* v. *Southern Pacific Transportation Company*, 543 F.2d 676 (9th Cir. 1976). The *Winnebago* opinion was not published when the case at bar was decided. *Southern Pacific* was cited to the Tenth Circuit but was not referred to in the opinion.

The principal holding of *Southern Pacific* was that agreements between a railroad and Indians respecting a right-of-way through a reservation were ineffective under the 1899 General Railroad Right-of-Way Act. Preceding a discussion of whether a consensual license could have been created, the court summarily stated that a license could not be implied in fact because of the railroad's failure to comply with 25 U.S.C. §§ 81 and 84. The court then focused on 25 U.S.C. § 177, and held that implying a license would

"run counter to the historical policies underlying section 177." *Id.* at 697. In summary, *Southern Pacific* does not conclude that § 81 applies where grant money, as opposed to tribal funds, is involved. Thus, the decision does not conflict with the Tenth Circuit opinion. Instead, *Southern Pacific* concerns an ineffective attempt to convey an interest in land contrary to the provisions of § 177, and an agreement to transport Indians in exchange for a "license" in favor of a railroad "relative to [Indian] lands."

The facts of *Wisconsin Winnebago Business Committee* v. *Koberstein, et al.*, 762 F.2d 613 (7th Cir. 1985), differ substantially from those under consideration. The governing body of the Wisconsin Winnebago Tribe ("Tribe") hired Koberstein as its attorney, apparently without being advised of a potential conflict of interest. Koberstein recommended and the Tribe entered into a contract with Ho-Chunk Management Corporation (Ho-Chunk), whose president was Koberstein. Under the agreement Ho-Chunk was to receive $27,000.00 for preparing a HUD proposal to secure federal funds with which to construct a bingo hall on tribal property, and for supervising its construction. [The opinion does not say if the funds were loaned or granted.]. Moreover, Ho-Chunk was to manage the bingo hall for five years and have the exclusive right to "operate and maintain the Property" for bingo games in exchange for 25% of the net operating profit. The management agreement was submitted to the Bureau of Indian Affairs for approval. Instead of approving or disapproving, a Field Solicitor for the Department of Interior opined that the agreement did not need § 81 approval because the funds to be spent (revenue from bingo operations) were not derived from amounts

due to the Tribe from the United States, trust property, or the proceeds of trust property.

Without § 81 approval and without knowledge of the solicitor's opinion, Ho-Chunk ordered the commencement of construction. When the facility was completed Ho-Chunk began bingo operations even though the Tribe voted to rescind the agreement and enacted an ordinance requiring Ho-Chunk to secure a license. When Ho-Chunk refused to comply the Tribe filed suit alleging that the management agreement was void for want of § 81 approval.

The trial court (the opinion is unpublished) held that the funds to be paid Ho-Chunk — 25% of the net operating profits — were derived from trust property (the use of tribal lands and facilities as a bingo hall for revenue), and, therefore, § 81 approval was necessary. In the Seventh Circuit Ho-Chunk did not contend that the management contract was not "relative to [Indian] lands", but limited its argument to the Field Solicitor's concept that § 81 applies only where the funds being spent are due a Tribe from the United States, or constitute trust property or the proceeds of trust property. In addition, Ho-Chunk contended that the "relative to [Indian] lands" portion of § 81 had been impliedly repealed by the enactment of numerous more specific statutes regulating the disposition, leasing, and use of tribal land. The Seventh Circuit rejected both arguments.

Although the opinion does not by express language agree with the trial court's holding that the funds paid Ho-Chunk (bingo revenue) were derived from "trust" property, a very strong implication to that effect exists. The

Seventh Circuit conceded the existence of numerous more specific statutes governing tribal lands, but found none to justify a holding of repeal by implication. Instead, the court stated that *because* the management agreement gave Ho-Chunk the absolute right to control the bingo facility located on tribal land and prevented the tribe from encumbering the property, the agreement was one "relative to [Indian] lands" within the purview of § 81.

Unlike *Winnebago*, the case at bar does not involve the control and dissipation of tribal trust property, the proceeds of trust property, or revenue derived from trust property (whether held by the government in trust or by the Tribe itself). Nor do the agreements in question involve the control or management of tribal land. Instead, the money in this case was a gift by the EDA to be used for the very purpose for which it was actually expended — to design and construct a museum and cultural center.

It is submitted that the Tenth Circuit was correct in concluding that § 81 was designed to protect the funds of the Tribe, not to protect grant money of the United States which is being spent for the benefit of a tribe under the auspices of another arm of the government, particularly where the grant presumably includes EDA procedural requirements designed to prevent its improper use.

In summary, *Winnebago* does not conflict with the Tenth Circuit's opinion in this case, *Brown or Southern Pacific*. *Brown* and the instant case involved non-tribal funds, whereas *Winnebago* involved tribal funds — revenue derived from a bingo hall operated on trust property — plus the control of tribal property. Thus, the argument of con-

flicting decisions of the courts of appeal should not serve as a basis for granting certiorari.

The Tribe's conclusion that the Seventh and Ninth Circuits have held that § 81 applies to contracts for the construction of improvements on tribal lands, whereas the Tenth Circuit has held otherwise, is not justified. The *Winnebago* case involved either a HUD grant or loan to construct a bingo hall. The construction contract wasn't the issue (the opinion doesn't mention the contractor). At issue was the management agreement which gave Ho-Chunk the exclusive right to manage and control tribal property. *Cf.* Contracts for the Employment of Managers of Indian Enterprises, 61 Op. Solicitor, Dept. of Interior, No. M-36119 (Feb. 14, 1952), cited in *Winnebago,* which concludes that contracts to operate a tribal farming enterprise, the development of livestock industries to utilize crops raised by the enterprise, and the marketing of surplus crops is "relaive to [Indian] lands" as that term is used in § 81.

In summary, the case at bar involves an EDA grant to construct an improvement on tribal trust property — it does not involve money owed the Tribe by the government or the proceeds of trust property or funds derived from its use. Conversely, *Winnebago* involved the disposition of funds derived from the use of tribal lands, as well as its management and control. The decisions simply are not conflicting.

B. RESPONSE TO THE TRIBE'S ASSERTION THAT THE SUPREME COURT'S SUPERVISORY POWER SHOULD BE EXERCISED BECAUSE OF THE TENTH CIRCUIT'S ALLEGED DEPARTURE FROM ESTABLISHED STATUTORY CONSTRUCTION

Apex and Oklahoma Surety do not take issue with the authorities cited by the Tribe dealing with the rules under which Indian Statutes are to be construed, but do question the Tribe's conclusion that the Tenth Circuit's decision constitutes a severe departure from the plain meaning of § 81.

The legislative history, recited above, clearly indicates that the ill Congress sought to cure was unconscionable attorney and claim-agent agreements under which both tribes and individual Indians were being scalped. Congress obviously had "service" type contracts in mind, otherwise the word "service" would not have been used. There was no need to protect the Indians in the use of grant money in the manner directed by the donor (the United States).

Surely Congress had no intention of making every contract with Indians and tribes subject to § 81 approval. This would have prevented Indians and tribes from hiring farm help, getting a house or barn built, or entering into similar "work" type agreements without Interior approval. As was brought out in oral argument before the Tenth Circuit, such a broad interpretation would lead to absurd results, and would necessitate Interior approval before a leaky roof could be repaired, a sewerline unstopped, an air conditioner fixed, crops harvested, real property improvements insured, and perhaps even a lawn mowed.

The Tribe's petition for certiorari (footnote 10, p. 29) incorrectly suggests that all sections of the 1871 Act covered

contracts for "any building or machinery erected or placed on their reservations." It is true that the 1871 Act contains a section with similar language, but it is not the section which was subsequently codified as § 81. The first section of the 1871 Act, found at 16 Stat. 544 through a portion of 570, is an appropriation provision which directs that the government withhold payments to contractors for goods and supplies, the transportation thereof, and for buildings or machinery erected or placed on reservations *under contracts entered into with the Interior Department* (pursuant to the appropriation) beyond 50% of the amount due until the accounts and vouchers have been submitted to and approved by a board of commissioners appointed by the President. Section 3 of the 1871 Act (16 Stat. 570, now § 81) contains no such language. The provision of the 1871 Act to which the Tribe refers subsequently appears as § 2107 of the revised statutes, but does not appear in the codified statutes. That particular section was repealed in 1933 (47 Stat. 1428-29). Therefore, it can hardly be concluded that a directive contained in the appropriation section of the 1871 Act indicates that Congress intended to subject construction contracts entered into by a Tribe (as opposed to Interior) to § 81 approval.

Not only would the Tribe's interpretation of § 81 deprive Indians of substantial independence, it would constitute a severe departure from the apparent intent of Congress. Although the Tenth Circuit declined to decide whether the contracts with the Tribe came within the purview of § 81 and based its decision solely upon the source of the funds, it is respectfully suggested that when § 81 was enacted Congress had no intention whatsoever of ex-

erting such close control over Indians and thus preventing them from building real property improvements without Interior approval. Conversely, there is no question but that Congress intended to prevent attorneys and agents from cheating the Indians through unconscionable "service" or "representational" type contracts under which they agree to assert claims against the United States or control and manage tribal property.

In summary, although the Tenth Circuit declined to pass upon the issue, it seems clear that Congress had no intention of requiring § 81 approval of tribal construction contracts, particularly where they are being funded with grant money.

C. RESPONSE TO PETITIONERS' SUGGESTION THAT THE TENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Tribe asserts that the Tenth Circuit's decision is in direct conflict with *Green* v. *Menominee Tribe*, 233 U.S. 558, 34 S.Ct. 706, 58 L.Ed. 1093 (1914). Although *Green* was cited to the Tenth Circuit, it is not discussed in the opinion, probably because the Tenth Circuit decided that § 81 was not applicable because tribal funds were not being spent. The facts in *Green* were that Indian traders had furnished members of the Menominee Tribe supplies necessary to cut or remove timber from an unallotted reservation. Green, one of the traders, sought to recover his charges from the Tribe and 158 of its members. Green asserted that the Tribe was liable because it had expressly guaranteed that the individuals would pay. The Court of Claims had jurisdiction under a special statute. That court held that an

action against the Tribe did not exist because the Statutes of Frauds barred the enforcement of a verbal guaranty.

An amended petition joined the United States as a defendant based upon an allegation that the Commissioner of Indian Affairs had employed an agent to represent the Tribe in its dealings concerning timber removal and the procurement of necessary supplies. The Court of Claims concluded that the special Act in question granted no right to sue the United States and conferred no jurisdiction over the individual Indians aside from their membership in the Tribe. In determining the procedural issue (whether a cause of action was stated), the Court of Claims further held that the relevant provisions of § 81 (then § 2103 of the revised statutes) applied, and that the contract was not enforceable because it was oral instead of in writing.

This Court affirmed, stating that the agent (not the plaintiff trader) had been paid and that he should have paid Green and other suppliers. This Court stated that under no circumstances should the Tribe or its individual members be forced to pay twice. It was also stated that the purported guaranty agreement fell within § 81 (now § 2103), although the conclusion seems unnecessary in deciding the controversy. Perhaps the Court's conclusion was based upon the fact that the suppliers were to be paid with the proceeds of the tribal logging operation.

The Tenth Circuit's opinion is not in conflict with *Green*. Green claimed he was entitled to be paid with the sales proceeds of timber taken from tribal property — the "proceeds" of trust property. That situation does not exist in the instant case -- taxpayer money was appropriated to

the Tribe and was properly spent. The grant funds could not have been used for any other purpose.

The Tribe also asserts that the Tenth Circuit's opinion conflicts with *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 15, 47 S.Ct. 361, 71 L.Ed. 658 (1927). That case concerned the authority of legal counsel under certain deeds and a power of attorney to maintain litigation over real property. The court held that the conveyance and power of attorney, which had been granted by an Indian "Captain" of the Pueblo, was void because the Indian Council had not authorized it, and because § 81 approval had not been obtained. The case clearly involved an ordinary agent or attorney "service" contract "relative to [Indian] lands", not a situation similar to the case at bar.

Green was decided in 1914 and *Santa Rosa* in 1927, yet the lower courts have had little or no difficulty in fairly resolving § 81 litigation. Certiorari should be denied.

CONCLUSION

Petitioners have not demonstrated a sufficient reason for the granting of certiorari. The opinions of the Circuit Courts are not conflicting. Title 25 U.S.C. § 81 was not intended to encompass construction contracts entered into by Tribes, particularly where they are to be funded with government grant money disbursed under the supervision of the granting governmental agency.

The Tenth Circuit's opinion is narrow in its application and is not likely to mislead lower courts in future litigation. Section 81 of Title 25 was intended to protect Indians

and tribes from unscrupulous attorneys and claim agents, not to inhibit the construction of improvements on tribal property with government grant money. Section 81 was intended to serve as a shield, not as a sword. The Tenth Circuit's conclusion does not violate the accepted rules of construction applicable to Indian statutes.

Finally, the opinion of the Tenth Circuit does not depart from the teaching of prior decisions of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents,
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September, 1985

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AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

John B. Hayes, being first duly sworn deposes and says:

1. That he is an active member of the Bar of this Court, and that he is an attorney for two Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company.

2. That the Opposing Brief of Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company, to Petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to which this ceritficate is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 28 of the Rules of the Supreme oCurt of the United States by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed to:

Messrs. G. William Rice
& F. Browning Pipestem
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Oklahoma City, OK 73102
Attorneys for Respondent Briesch Engineering Company, Inc.

3. That the foregoing represents service on parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, 40 copies of this Opposing Brief of Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company, to Petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 3rd day of Sept., 1985, which is within the time alowed for filing under the Rules of this Court.

John B. Hayes

Subscribed and sworn to before me on the 3rd day of Sept., 1985.

Mary Ann Ross
Notary Public

My Commission Expires:
5-1-88

(SEAL)